Supreme Court, U.S.
FILED
OCT 27 1992
OFFICE OF THE CLERK

No. 92-553

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PHYLLIS KAHN and STEVEN G. THORNE,
Petitioners,

v.

KOHLBERG, KRAVIS, ROBERTS & Co., a New York Limited Partnership, KKR ASSOCIATES, a New York Limited Partnership, and WHITEHALL ASSOCIATES, L.P., a Delaware Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

FREDRIC J. ZEPP
Counsel of Record
LOUISE M. ZEITZEW
NANCY E. MCDERMOTT
LATHAM & WATKINS
885 Third Avenue
Suite 1000
New York, New York 10022
(212) 906-1200
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court below properly applied a uniform federal limitations period to the implied private right of action under Section 215 of the Investment Advisers Act of 1940?

2. Whether the court below properly determined that the "continuing wrong" theory did not prevent the statute of limitations from barring Petitioners' claim under Section 215 of the Investment Advisers Act of 1940?

RULE 29.1 LIST

Pursuant to Rule 29.1 of the Supreme Court Rules, the corporate parents, subsidiaries (other than wholly-owned subsidiaries) and affiliates of Respondents Kohlberg Kravis Roberts & Co., KKR Associates and Whitehall Associates, L.P. are as follows:

KKR PORTFOLIO COMPANIES WITH PUBLICLY TRADED SECURITIES

American Re Corporation
Auto Zone, Inc.
Duracell International Inc.
First Interstate Bancorp
Fleet/Norstar Financial Group
Fred Meyer, Inc.
Homes Holding Corporation
Idex Corporation
K-III Communications Corporation
Layne, Inc.
Owens-Illinois, Inc.
Owens-Illinois, Group, Inc.
Red Lion Properties, Inc.
RJR Nabisco Holdings Corp.
RJR Nabisco Holdings Group, Inc.
RJR Nabisco, Inc.
Safeway, Inc.
Seaman Furniture Co., Inc.
The Stop-N-Shop Companies, Inc.
TW Services, Inc.
Union Texas Petroleum Holdings, Inc.
Walter Industries, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	4
I. NO CONFLICT EXISTS BETWEEN THE COURT OF APPEALS' DECISION REGARDING THE APPLICABLE STATUTE OF LIMITATIONS AND THE DECISIONS OF THIS COURT OR ANY OTHER COURT	4
A. The Second Circuit Is The First And Only Appellate Court To Determine The Limitations Period Applicable To The Implied Private Cause Of Action Under Section 215 Of The IAA	5
B. The Second Circuit's Decision Was Completely Consistent With The Standard Articulated By This Court In *Lampf*	7
II. THE DECISION OF THE COURT OF APPEALS NOT TO APPLY A CONTINUING WRONG THEORY COMPORTS WITH FEDERAL LAW	11
III. PETITIONERS' LACK OF STANDING ALSO WARRANTS A DENIAL OF CERTIORARI	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Afshar v. Procon Inc., 442 F. Supp. 887 (S.D.N.Y. 1977), *aff'd without op.*, 580 F.2d 1044 (2d Cir. 1978) 12
Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 107 S. Ct. 2759 (1987) 7, 8
Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977) 12
Association of Data Processing Service Organizations, Inc. v. Camp, Inc., 397 U.S. 150, 90 S. Ct. 827 (1970) 16, 17
Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691 (1962) 16
Braxton v. United States, 111 S. Ct. 1854 (1991) 4
Brown v. Producers Livestock Loan Co., 469 F. Supp. 27 (D. Utah 1978) 6
DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S. Ct. 2281 (1983) 7, 11
Derby v. Perschke, No. 88-C3835, 1990 U.S. Dist. Lexis 15052 (N.D. Ill. Nov. 8, 1990) 6
Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942 (1968) 16
Freschi v. Grand Coal Venture, 551 F. Supp. 1220 (S.D.N.Y. 1982) 14
Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080 (S.D.N.Y. 1977), *aff'd without op.*, 636 F.2d 1201 (2d Cir. 1980) 16
Helman v. Murry's Steaks, Inc., 742 F. Supp. 860, *reh'g denied*, 743 F. Supp. 289 (D. Del. 1990) 14
Holloway v. Combined Equities, Inc., 628 F. Supp. 59 (M.D. La. 1986) 14
Ingenito v. Bermec Corp., 376 F. Supp. 1154 (S.D.N.Y. 1974) 14
In re Taxable Municipal Bond Securities Litigation, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,834 (E.D. La. 1992) 6
Intre Sport, Ltd. v. Kidder, Peabody & Co., 625 F. Supp. 1303 (S.D.N.Y. 1985), *aff'd without op.*, 795 F.2d 1004 (2d Cir. 1986), *vacated on other grounds*, 482 U.S. 922, 107 S. Ct. 3203 (1987) 15

TABLE OF AUTHORITIES

	Page
Korn v. Merrill, 403 F. Supp. 377 (S.D.N.Y. 1975), *aff'd without op.*, 538 F.2d 310 (2d Cir. 1976)	12, 13, 14
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, *reh'g denied*, 112 S. Ct. 27 (1991)	*passim*
Lowell Wiper Supply Co. v. Helen Shop, Inc., 235 F. Supp. 640 (S.D.N.Y. 1964)	12
Magna Associates v. Torgrove, 585 F. Supp. 585 (D. Colo. 1984)	12
McCullough v. Leede Oil & Gas, Inc., 617 F. Supp. 384 (W.D. Okla. 1985)	10
Muller v. M.D. Sass Associates, Inc., No. 91-3762, 1992 U.S. Dist. Lexis 5736 (D.N.J. April 22, 1992)	6
Nielsen v. Professional Financial Management, Ltd., 682 F. Supp. 429 (D. Minn. 1987)	14
Paul S. Mullin & Associates, Inc. v. Bassett, 632 F. Supp. 532 (D. Del. 1986)	16
Person v. New York Post Corp., 427 F. Supp. 1297 (E.D.N.Y.), *aff'd without op.*, 573 F.2d 1294 (2d Cir. 1977)	16
Phillips v. Levie, 593 F.2d 459 (2d Cir. 1979)	12
Reed v. United Transportation Union, 488 U.S. 319, 109 S. Ct. 621 (1989)	7
Reid v. Walsh, 645 F. Supp. 685 (M.D. La. 1986)	14
Reserve Management Corp. v. Anchor Daily Income Fund, Inc., 459 F. Supp. 597 (S.D.N.Y. 1978)	16
Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962)	15
SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 84 S. Ct. 275 (1963)	9
Stewart v. Germany, 631 F. Supp. 236 (S.D. Miss. 1986)	14
Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 100 S. Ct. 242 (1979)	5, 10, 12
United States v. Texarkana Trawlers, 846 F.2d 297 (5th Cir.), *cert. denied*, 488 U.S. 943, 109 S. Ct. 369 (1988)	10

TABLE OF AUTHORITIES

	Page
Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938 (1985)	7, 8
STATUTES AND RULES	
15 U.S.C. § 77m (1981)	10
15 U.S.C. § 78cc(b) (1981 & Supp. 1992)	10
15 U.S.C. § 80a-35 (1981)	5
15 U.S.C. § 80b-2(a)(11) (1981)	3
15 U.S.C. § 80b-3 (1981 & Supp. 1992)	3
15 U.S.C. § 80b-3(b)(3) (1981)	3
15 U.S.C. § 80b-5 (1981 & Supp. 1992)	3
15 U.S.C. § 80b-6 (1981)	3
15 U.S.C. § 80b-14 (1981 & Supp. 1992)	6, 8
15 U.S.C. § 80b-15 (1981)	3, 8
Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1-80b-21 (1981 & Supp. 1992)	1
Minn. Const. art. III, § 1	17
Minn. Const. art. XI, § 8	17
Minn. Stat. § 8.06 (1990)	17
Minn. Stat. § 11A.03 (1990)	17
N.Y. Civ. Prac. L. & R. § 213.1 (McKinney 1990)	10
Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1981 & Supp. 1992)	5
Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1981 & Supp. 1992)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-553

PHYLLIS KAHN and STEVEN G. THORNE,
Petitioners,

v.

KOHLBERG, KRAVIS, ROBERTS & CO., a New York Limited Partnership, KKR ASSOCIATES, a New York Limited Partnership, and WHITEHALL ASSOCIATES, L.P., a Delaware Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Kohlberg Kravis Roberts & Co. ("KKR"), KKR Associates and Whitehall Associates, L.P., respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Second Circuit in this case entered on June 30, 1992, and reported at [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,889 (2d Cir. 1992).

STATEMENT OF THE CASE

This action purportedly arises under the Investment Advisers Act of 1940 (the "IAA").[1] The business of KKR and its affiliate KKR Associates is entrepreneurial

[1] 15 U.S.C. §§ 80b-1 through 80b-21 (1981 & Supp. 1992).

merchant banking. KKR organizes "funds," contractual commitments to provide co-investment capital for the acquisition of operating companies. (*See* JA-160-161) After having participated in the 1984 and 1986 "Funds" (JA-25; JA-304),[2] on October 2, 1987, the Minnesota State Investment Board (the "Board") renewed its commitment to KKR and agreed to provide, on call, approximately $146,000,000 of Minnesota State pension fund moneys to the 1987 Fund (the "Commitment Agreement"). (JA-226, ¶ 9)

In August of 1991, Petitioners, who are strangers to the Commitment Agreement, brought this action, purportedly on behalf of the Board, against KKR and KKR Associates[3] to rescind the Commitment Agreement between the Board and KKR.[4] (JA-17) As maintained by Petitioners in the Amended Complaint:

> [participants in the 1987 Fund] by letter agreement, commit to invest for a six year period with KKR a specified dollar amount by participating in a fund. Once they enter into these participation agreements, KKR's clients *are irrevocably bound*, except under extremely limited circumstances, to provide funds for investments to be selected in the sole discretion of KKR. . . .

---

[2] Cites to "JA" are references to the Joint Appendix filed with the Second Circuit in this action.

[3] Pursuant to the Commitment Agreement, in the Fall of 1988 the 1987 Fund participants became limited partners in Whitehall Associates, L.P. ("Whitehall"). (JA-226, ¶ 11) Petiitoners also purported to assert the Board's alleged derivative right to bring an IAA claim against KKR and KKR Associates on behalf of Whitehall, to void "the agreement or agreements pursuant to which KKR Associates acts as Whitehall's general partner." (JA-230, ¶ 16)

[4] Petitioners did not name the Board as a party in the Complaint. (JA-3) After Respondents moved to dismiss on the grounds, *inter alia*, that Petitioners failed to name an indispensable party (Ptn. A-4), Petitioners amended the Complaint to add the Board as a defendant. (JA-217)

(JA-218 (emphasis added)); *see* Appendix to Petition for a Writ of Certiorari ("Ptn. A") 3).

The Petitioners' entire action is premised upon the allegation that KKR has wrongfully failed to register under the IAA. Specifically, Petitioners asserted a claim for rescission pursuant to Section 215 of the IAA, 15 U.S.C. § 80b-15 (1981), based upon KKR's: (1) failure to register as an investment adviser allegedly in violation of Section 203 of the IAA, 15 U.S.C. § 80b-3 (1981 & Supp. 1992), (2) receipt of performance-based compensation allegedly prohibited by Section 205 of the IAA, 15 U.S.C. § 80b-5 (1981 & Supp. 1992), and (3) alleged fraudulent conduct in violation of Section 206 of the IAA, 15 U.S.C. § 80b-6 (1981), based upon failure to disclose contractual arrangements regarding compensation.

Respondents moved to dismiss the Complaint in its entirety, *inter alia*, on the grounds that Petitioners' action was barred by the statute of limitations and by laches.[5] The Board answered the Amended Complaint

---

[5] Respondents further pointed out to the District Court that if, despite Petitioners' evident lack of standing, it could reach the merits of Petitioners' Amended Complaint, there would be no merit to Petitioners' IAA claim in any event: KKR is not an "investment adviser" as defined in Section 202(a)(11) of the IAA, 15 U.S.C. § 80b-2(a)(11) (1981), and, is therefore not governed by the IAA; and, even if KKR were deemed to be an investment adviser, it is clearly exempt from registration as such pursuant to Section 203(b)(3) of the IAA, 15 U.S.C. § 80b-3(b)(3) (1981), as it has had fewer than fifteen "clients" during the twelve months preceding the Complaint and has never held itself out generally to the public as an investment adviser and has never acted as the investment adviser to a registered investment company or business development company. Since KKR was not required to register, there can be no violation of Section 205. Furthermore, Respondents pointed out to the District Court that KKR fully disclosed to the Board and all other interested parties prior to any decision on their part to participate in the 1987 Fund the structure and nature of fees to be paid to KKR and its affiliates.

and also asserted, among other affirmative defenses, that the Petitioners' action was barred by the applicable statute of limitations and by laches. (JA-387, ¶¶ 35, 36) The Board also supported Respondents' Motion to Dismiss.

The District Court dismissed the action on the basis that the statute of limitations barred Petitioners' IAA claim. On appeal to the Court of Appeals, the Second Circuit, relying upon *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778-79, *reh'g denied*, 112 S. Ct. 27 (1991), affirmed the District Court's decision to apply a uniform federal limitations period to Petitioners' IAA claim, and also found Petitioners' claim barred. The Second Circuit also affirmed the District Court's decision that the "continuing wrong" theory does not apply to Petitioners' IAA claim. Further, as the Second Circuit found, the IAA claim is based entirely upon matters of public record, and was thus discoverable by both Petitioners and the Board no later than 1988/1989, several years before the Petitioners filed the Complaint. (Ptn. A-25-27)

ARGUMENT

I. NO CONFLICT EXISTS BETWEEN THE COURT OF APPEALS' DECISION REGARDING THE APPLICABLE STATUTE OF LIMITATIONS AND THE DECISIONS OF THIS COURT OR ANY OTHER COURT

Petitioners improperly seek a further review by this Court without in any way demonstrating the proper invocation of the certiorari jurisdiction of this Court. Petitioners point to no conflict between the decision of the Second Circuit to apply a uniform federal limitations period to the implied private cause of action under Section 215 of the IAA and the controlling precedents of this Court or the precedents of any other federal or state court. *See Braxton v. United States*, 111 S. Ct. 1854, 1857 (1991). Furthermore, Petitioners do not identify either a substantial federal question or a significant inequity that demands redress. Thus, as discussed herein, a grant of certiorari is unwarranted.

A. The Second Circuit Is The First And Only Appellate Court To Determine The Limitations Period Applicable To The Implied Private Cause Of Action Under Section 215 Of The IAA

In *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 24, 100 S. Ct. 242, 249 (1979), this Court held that Section 215 of the IAA provides a limited private cause of action to parties to an investment advisers agreement.[6] This Court was silent in *Transamerica* regarding the applicable statute of limitations.

This case presented to the Second Circuit, *inter alia*, a simple question regarding the timeliness of this lawsuit. In finding a uniform federal limitations period applicable to an implied private cause of action under Section 215 of the IAA, the Second Circuit rendered *the first and only* federal appellate court ruling upon the proper limitations period. Further, the Second Circuit was not required to determine which of two potentially applicable uniform federal limitations periods to apply (the one year period in Section 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-35 (1981) (the "ICA") or the one year/three year limitations period that predominates in the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1981 & Supp. 1992) (the "1933 Act") and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1981 & Supp. 1992) (the "1934 Act")), because the court found that Petitioners' four year old purported claim would be barred under either limitations period.

The District Courts that have addressed the limitations issue have *unanimously* reached the same conclusion as the Second Circuit's determination that the most appropriate limitations period for an IAA claim is a uniform limitations period borrowed from the federal securities laws. These District Courts have each adopted a one

[6] This Court also held that no legal or equitable remedies other than an action for rescission of the investment advisers contract (and related remedies) are available. *Id.* at 24 n.14, 100 S. Ct. at 249 n.14.

year/three year limitations period from the 1933 and 1934 Acts for actions brought under Section 215 of the IAA. *See In re Taxable Mun. Bond Sec. Litig.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,834, 93,327 (E.D. La. 1992) (adopting one year from discovery and three year period of repose from the 1933 and 1934 Acts for IAA claims based upon failure to register); *Muller v. M.D. Sass Assocs., Inc.*, No. 91-3762, 1992 U.S. Dist. Lexis 5736, at *31-32 (D.N.J. April 22, 1992) (applying the one year from discovery and three year repose period made applicable to Section 10(b) and Rule 10b-5 in *Lampf*, to IAA claim premised upon a violation of Section 206); *Derby v. Perschke*, No. 88-C3835, 1990 U.S. Dist. Lexis 15052, at *13 (N.D. Ill. Nov. 8, 1990) (Pre-*Lampf* decision finding one year from the alleged violation and three year repose period in Section 13 of the 1933 Act appropriate for IAA actions premised upon violation of the registration requirements in Section 203); *see also Brown v. Producers Livestock Loan Co.*, 469 F. Supp. 27, 33 (D. Utah 1978) (Pre-*Transamerica* case applying the same statute of limitations applicable to claims under Section 10(b) of the 1934 Act to an implied private right of action pursuant to Section 206).

Furthermore, *no state court* has yet had occasion to rule upon the limitations issue.[7] There is thus no conflict between the Second Circuit's decision and the decision of any other court.[8]

---

[7] Federal and state courts have concurrent jurisdiction under Section 214 of the IAA. 15 U.S.C. § 80b-14 (1981 & Supp. 1992).

[8] Petitioners challenge the application of a "legal" limitations period to statutory IAA claims in the first instance, asserting that only equitable bars to relief should apply. (Petition for a Writ of Certiorari ("Ptn.") 33-35) As Respondents explained in their Motion to Dismiss, Petitioners' claims, based entirely upon matters of public record and thus discoverable by both Petitioners and the Board, are barred by laches in any event. (Ptn. A-4; A-25-27)

B. The Second Circuit's Decision Was Completely Consistent With The Standard Articulated By This Court In *Lampf*

Petitioners do not dispute that the Second Circuit applied the appropriate standard under Supreme Court precedents to determine the applicable limitations period. Petitioners merely argue with the result reached by the Second Circuit in applying that standard.

In *Lampf*, this Court articulated a three-step "hierarchical inquiry for ascertaining the appropriate limitations period for a federal cause of action" when the law is silent. *Lampf* reaffirmed that the federal courts do not hesitate to borrow federal limitations periods " 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.' " *Lampf*, 111 S. Ct. at 2778, quoting *Reed v. United Transp. Union*, 488 U.S. 319, 324, 109 S. Ct. 621 (1989), quoting *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72, 103 S. Ct. 2281, 2294 (1983); (Ptn. A-5); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 148, 107 S. Ct. 2759, 2763 (1987).

Applying the first step of the *Lampf* inquiry, the Second Circuit determined that the federal interests in predictability and judicial economy counseled the adoption of a uniform statute of limitations for IAA claims. The court found that Section 215 of the IAA " 'encompass[es] numerous and diverse topics and subtopics' . . . such that a single state limitations period may not be consistently applied within a jurisdiction." (Ptn. A-11, quoting *Lampf*, 111 S. Ct. at 2779, quoting *Wilson v. Garcia*, 471 U.S. 261, 273, 105 S. Ct. 1938, 1945 (1985)).

Petitioners assert that because *Transamerica* restricts the private litigant "to one form of action and one form

of relief," *Transamerica* indicates that there is no need for a uniform limitations period. (Ptn. 23) As the Second Circuit noted, the Petitioners' "analysis focuses upon the single *remedy* available [to rescind the advisers agreement] and ignores the fact that there are numerous and varied grounds for invoking it." (Ptn. A-12 (emphasis added)) A cause of action pursuant to Section 215 may be premised upon a "violation of any provision of the IAA."[9] 15 U.S.C. § 80b-15; (Ptn. A-11). Therefore, a court focusing on each alleged violation underlying any given Section 215 claim could well find that the claims should be analogized to any of several common law claims (*e.g.*, a violation of state securities regulations or the state professional code, common law breach of contract, fraud, or an action in which the relief sought is rescission). (Ptn. A-11) The decisions of this Court thus favor adoption of a uniform limitations period. *See, e.g., Lampf*, 111 S. Ct. at 2779; *Agency Holding*, 483 U.S. at 149, 107 S. Ct. at 2763; *Wilson*, 471 U.S. at 274, 105 S. Ct. at 1947.

Applying the second step of the *Lampf* inquiry, the Second Circuit found IAA controversies to be multi-state in nature, presenting the possibility of multiple state limitations periods, and the dangers of forum shopping and litigation over forum shopping. The Second Circuit therefore deemed a uniform federal limitations period more beneficial than a state limitations period. *See Lampf*, 111 S. Ct. at 2779; *Agency Holding*, 483 U.S. at 154, 107 S. Ct. at 2766. Contrary to Petitioners' claim, the finding of a limited remedy for IAA claims in *Transamerica* does not diminish the multistate character of IAA claims. Indeed, the IAA *requires* interstate conduct as a jurisdictional predicate. 15 U.S.C. § 80b-14; (Ptn. A-13). IAA "violations could occur in numerous states both with respect to a single plaintiff and with respect to multiple

[9] As noted, Petitioners alleged three separate bases for their Section 215 claim.

plaintiffs." [10] (Ptn. A-13) Thus, the Second Circuit correctly concluded, as did this Court in *Lampf* and *Agency Holding*, that it is "preferable to have one uniform period and to eliminate the uncertainty and excessive litigation that could ensue if the various states' limitations periods could potentially apply." (Ptn. A-13)

Following the third step of the *Lampf* inquiry, the Second Circuit determined that both the one year limitations period in Section 36 of the ICA and the federal one year/three year limitations period that predominates in the federal securities laws plainly provide a "closer fit" for the IAA than state law. (Ptn. A-14); *Lampf*, 111 S. Ct. at 2779. As this Court explained in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186, 84 S. Ct. 275, 280 (1963), the IAA "was the last in a series of Acts designed to eliminate certain abuses in the securities industry." (*See* Ptn. A-14) The Second Circuit reasoned that the right of action described in Section 36(b) of the ICA and the various rights of action in the 1933 and 1934 Acts which generally regulate the honesty and integrity of those who deal commercially on the national securities markets, balance the same interests as are involved in the IAA. These interests afford the same protection as the cause of action contained in the IAA, and share a common purpose and similar elements with the IAA. (Ptn. A-7); *Lampf*, 111 S. Ct. at 2779. Therefore, the Second

---

[10] Petitioners alleged in the Amended Complaint that KKR entered into 78 Commitment Agreements for the 1987 Fund alone, that KKR is an "investment adviser to over 3 million persons," and that "KKR's clients reside in many different states. . . ." (JA-226, ¶ 9; JA-218; JA-229, ¶ 14b) While Respondents heartily dispute the accuracy of the Petitioners' characterizations of KKR, Respondents do not dispute that the participants and their beneficiaries are agencies of, or reside in, numerous different states. Additionally, the instant action, by Minnesota claimants in a New York forum, itself illustrates the need for a uniform federal limitations period.

Circuit found that they were more analogous [11] to the IAA claims than any state source. (Ptn. A-16-17) [12]

Petitioners' assertion that this Court suggested in *Transamerica* that state law analogies would be applicable to the IAA is disingenuous. (Ptn. 32) In *Transamerica*, this Court briefly considered whether Congress intended for Section 215 actions to be brought only in state court. This Court, however, readily rejected such a construction of the statute as "anomalous," finding instead an implied *federal* private cause of action. *Transamerica*, 444 U.S. at 19 n.8, 100 S. Ct. at 247 n.8.[13] Additionally, Petitioners' suggestion that *DelCostello* and *Agency Holding* re-

---

[11] The Second Circuit also noted the exact parallels between various provisions of the IAA and various provisions of other federal securities laws. (Ptn. A-18)

[12] Furthermore, public policy supports the application of the uniform federal limitations period selected by the Second Circuit. The fact that Section 215 actions afford only rescissionary relief suggests that the applicable limitations period be kept to the shortest permissible length. *See McCullough v. Leede Oil & Gas, Inc.*, 617 F. Supp. 384, 387 (W.D. Okla. 1985); *United States v. Texarkana Trawlers*, 846 F.2d 297, 305 n.20 (5th Cir.), *cert. denied*, 488 U.S. 943, 109 S. Ct. 369 (1988). Additionally, Congress has specifically deemed one year from the violation to be an appropriate time period for claims based on failure to register, because such a claim cannot be concealed. *McCullough*, 617 F. Supp. at 387; *see* 15 U.S.C. § 77m (1981). As the Second Circuit noted, the claims asserted here are all tied to the failure to register. (Ptn. A-16)

[13] Nor is there any merit to Petitioners' contention that New York Civil Practice Law & Rules Section 213.1, which is applicable to an action in which the relief sought is rescission, provides a "closer fit" with the IAA. Section 213.1 is a default limitations period for any "action for which no limitation is specifically provided for by law." This limitations period reflects none of the interests underlying the IAA. Indeed, if it is appropriate to choose a limitations period by analogizing solely to the remedy requested, then Section 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b) (1981 & Supp. 1992) (containing a one year/three year limitations period), which parallels Section 215 of the IAA is a far more compelling analogy.

quire that a state limitations period is to be borrowed unless the federal cause of action in question involves an "anomalous federal statutory action that ha[s] no counterpart at common law" (Ptn. 30), simply does not square with *Lampf*'s direction to borrow the limitations period that provides the "closest fit" and that does not frustrate federal policy.[14] *Lampf*, 111 S. Ct. at 2778, 2779.

The Second Circuit thus followed the dictates of *Lampf* in borrowing a limitations period from the federal securities laws for IAA claims. Furthermore, no conflict exists between the controlling precedents of this Court and the decision of the Second Circuit regarding the applicable limitations period, or between the decision of the Second Circuit and any other court. This case simply does not present an important question of federal law which has not been, but should be settled by this Court, and which conflicts with decisions of this Court.

II. THE DECISION OF THE COURT OF APPEALS NOT TO APPLY A CONTINUING WRONG THEORY COMPORTS WITH FEDERAL LAW

The Second Circuit's determination to reject the "continuing wrong" theory to prevent the expiration of the limitations period in the present case was wholly consistent with established authorities finding the "continuing

[14] The Second Circuit properly rejected Petitioners' argument that the court is precluded from looking beyond events contemporaneous with the statutory enactment at issue to determine the appropriate limitations period for an implied federal cause of action. Relying on *DelCostello*, 462 U.S. at 169 n.21, the Second Circuit noted: "While the court may be influenced by evidence of Congressional intent, there is no *need* to show that at the time that Congress provided the express federal limitations period it intended that it would apply to [the implied] cause of action . . . . Rather a source should be chosen because it is the most suitable source for borrowing." (Ptn. A-11 (citation omitted) (emphasis in original)); *see also Lampf*, 111 S. Ct. at 2779 (for purposes of borrowing, it is appropriate to look for analogous limitations period designed to accommodate a similar balance of interests).

wrong" theory inapplicable in federal securities law cases. There are no contrary cases regarding the accrual of an IAA claim, as the Second Circuit's opinion is the first to address the issue. Furthermore, the Second Circuit's decision furthers the important policy of repose. Consequently, a grant of certiorari to address the Second Circuit's decision not to apply the "continuing wrong" theory is unwarranted.

Federal law does not support the application of a "continuing wrong" theory to extend the limitations period in this case.[15] (*See* Ptn. A-19) If, when the Board entered into the 1987 Commitment Agreement with KKR, KKR was an unregistered investment adviser and not exempt from registration under Section 203 of the IAA, then the Board's IAA cause of action that Petitioners seek to assert accrued upon entry into the agreement, and a cause of action to rescind the agreement[16] fully existed at the moment that the agreement was entered. As the court noted in *Korn v. Merrill*, 403 F. Supp. 377, 388 (S.D.N.Y. 1975), *aff'd without op.*, 538 F.2d 310 (2d Cir. 1976), each payment of investment advisers fees to an investment adviser pursuant to a wrongful contract is not an independent and continuing injury giving rise to a separate cause of action. Rather, the continued payments merely affect the determination of damages stemming from the alleged wrong (*e.g.*, entry into the wrongful contract). (*See* Ptn. A-23); *see also Magna Assocs. v. Torgrove*, 585 F. Supp. 585, 589-90 (D. Colo. 1984); *Afshar v. Procon Inc.*, 442 F. Supp. 887, 890 (S.D.N.Y. 1977), *aff'd without op.*, 580 F.2d 1044 (2d Cir. 1978); *Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp.

[15] Federal law governs when a federal cause of action accrues and when the limitations period commences to run. *Phillips v. Levie*, 593 F.2d 459, 462 (2d Cir. 1979); *Arneil v. Ramsey*, 550 F.2d 774, 780 (2d Cir. 1977). Petitioners' citations to New York contract law principles are therefore irrelevant.

[16] As this Court explained in *Transamerica*, 444 U.S. at 18, 100 S. Ct. at 246, under the IAA, an agreement is "voidable," not void (or "unlawful").

640, 644 (S.D.N.Y. 1964).[17] Thus, once the Board and KKR entered into the allegedly wrongful 1987 Commitment Agreement, the limitations period was triggered.[18]

Furthermore, the limitations period must be measured from the date of the 1987 Commitment Agreement pursuant to which the Board became irrevocably bound to KKR, because the rights and obligations of the parties were fixed by that agreement and thereafter governed by that agreement. The federal securities case law is clear that where, as here, subsequent payments represent the fulfillment of obligations previously created and not the

---

[17] A claim accrues when the act causing the injury occurs, not when the injured party ceases to incur more damages. *Korn*, 403 F. Supp. at 388.

[18] Critically, as the Second Circuit found, each of the various IAA violations alleged by Petitioners is actually premised upon the allegation that KKR has wrongfully failed to register under the IAA. (Ptn. A-16) That is to say, each of the alleged IAA violations (*see supra* p.3) hinges, directly or indirectly, upon the notion that KKR is an investment adviser not exempt from registration. The alleged violation of Section 203 is that KKR is a non-exempt investment adviser subject to the IAA's registration requirements, and that KKR's entry into the agreement without being registered was therefore wrongful. Only if KKR was required to register could there have been a violation of Section 205, which is applicable only to investment advisers subject to the IAA's registration requirements. Similarly, the sole alleged violation of Section 206 in this case is based upon the failure to disclose the nature of compensation to be received "in the Minnesota Commitment Agreement." (JA-228, ¶ 13) Petitioners did not allege that complete disclosure of the fee arrangements was not made; rather they complained only that the disclosure was not made in the Commitment Agreement. It would appear from their focus on the Commitment Agreement that Petitioners are claiming that disclosure was required to have been made in a single source (such as a "Form ADV," which is required only of investment advisers registered or required to be registered). Thus, Petitioners' focus on the Commitment Agreement as a basis for a Section 206 claim is also apparently linked to their assertion that KKR was required to have registered as an adviser at or prior to the time the 1987 Commitment Agreement was entered into.

creation or assumption of new obligations, no new cause of action will arise. (Ptn. A-21); *Holloway v. Combined Equities, Inc.*, 628 F. Supp. 59, 61-62 (M.D. La. 1986) (Section 12(1) of the 1933 Act); *Ingenito v. Bermec Corp.*, 376 F. Supp. 1154, 1184 (S.D.N.Y. 1974) (Section 10(b) of the 1934 Act); *Reid v. Walsh*, 645 F. Supp. 685, 687 (M.D. La. 1986) (Section 12(1) of the 1933 Act); *Freschi v. Grand Coal Venture*, 551 F. Supp. 1220, 1229 (S.D.N.Y. 1982) (Section 10(b) of the 1934 Act); *Nielsen v. Professional Fin. Management, Ltd.*, 682 F. Supp. 429, 437 (D. Minn. 1987) (Section 12(2) of the 1933 Act).[19] Therefore, no capital contributions by the Board subsequent to the initial entry of the contract can be viewed as new or independent violations of the IAA.

As the Second Circuit observed, the cases cited by Petitioners applying the "continuing wrong" theory outside the context of the securities laws (*e.g.*, in antitrust, patent infringement and civil rights cases) are inapposite. (Ptn. A-19-24) Unlike those cases, this case does not involve a situation where the right to recovery could be barred before a cause of action arises, because the right to recovery arises the moment the allegedly wrongful contract is formed. (Ptn. A-19)[20] Thus, there is no inconsistency between the Second Circuit decision and the cases cited by Petitioners.

[19] The commitment theory "has been consistently applied in the securities law context," (Ptn. A-24 (citations omitted)) and does not apply only in Rule 10b-5 cases, as Petitioners imply.

[20] Nor does the existence of a continuing relationship between the parties compel application of the "continuing wrong" theory here. (Ptn. A-22-23) Many securities law cases applying the accrual rule employed by the Second Circuit involve both continuing payments and a continuing (and often fiduciary) relationship between the parties. *See, e.g., Korn*, 403 F. Supp. 377 (client-investment adviser); *Helman v. Murry's Steaks, Inc.*, 742 F. Supp. 860, *reh'g denied*, 743 F. Supp. 289 (D. Del. 1990) (minority shareholder-corporate director, and beneficiary-trustee); *Stewart v. Germany*, 631 F. Supp. 236 (S.D. Miss. 1986) (general partner-managing general partner).

Additionally, the Second Circuit held that Petitioners' continuing wrong "argument ignores the whole purpose behind a statute of limitations and the importance of the policy of repose." (Ptn. A-24) Petitioners' argument would effectively eliminate any limitations period for the life of an investment advisers agreement, regardless of the factual situation involved. Under the limitations period Petitioners suggest, Petitioners could wait not only until after the entire six year period of the 1987 Commitment Agreement had elapsed (knowing full well the basis of their claim (*see* Ptn. A-25-27)), but wait an additional six years thereafter before asserting a claim to rescind the contract.

The IAA provides a limited, narrow form of relief to private claimants to protect investors from unscrupulous advisers. Thus, it would make a mockery of the statutory purpose to provide an openended limitations period, inviting a plaintiff to sit on his rights and speculate risk free by asserting a rescission claim only if and when any investment turns out badly. *See Intre Sport, Ltd. v. Kidder, Peabody & Co.*, 625 F. Supp. 1303, 1312 (S.D.N.Y. 1985), *aff'd without op.*, 795 F.2d 1004 (2d Cir. 1986), *vacated on other grounds*, 482 U.S. 922, 107 S. Ct. 3203 (1987); *see also Royal Air Properties, Inc. v. Smith*, 312 F.2d 210, 213-14 (9th Cir. 1962).

In sum, Petitioners have asserted no real inconsistency between the decision of the Second Circuit not to apply the "continuing wrong" theory and existing case law, and no inequity meriting this Court's review.

III. PETITIONERS' LACK OF STANDING ALSO WARRANTS A DENIAL OF CERTIORARI

Because it is germane to this Court's exercise of discretion whether to grant certiorari, we note that such a grant is also unwarranted on the grounds that Petitioners lack standing to bring the Board's IAA claim. Neither the Second Circuit nor the District Court reached

the additional grounds raised by Respondents for dismissing the Amended Complaint, including Petitioners' lack of standing to assert the Board's IAA claim, if any. (Ptn. A-41) Respondents submit that, in fact, Petitioners lack standing to bring this action on behalf of the Board[21] either in their direct capacity or derivatively. This Court should therefore decline to exercise certiorari jurisdiction.

It is fundamental that to have standing a plaintiff must have "'a personal stake in the outcome of the controversy,'" *Flast v. Cohen*, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953 (1968), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962), and must be able to prove that "the challenged [conduct] has caused him injury in fact." *Association of Data Processing Serv. Orgs., Inc. v. Camp, Inc.*, 397 U.S. 150, 152, 90 S. Ct. 827, 829 (1970). Standing under the IAA is thus strictly limited to the clients or prospective clients of investment advisers. *See Paul S. Mullin & Assocs., Inc. v. Bassett*, 632 F. Supp. 532, 537 (D. Del. 1986); *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080, 1095 (S.D.N.Y. 1977), *aff'd without op.*, 636 F.2d 1201 (2d Cir. 1980); *Reserve Management Corp. v. Anchor Daily Income Fund, Inc.*, 459 F. Supp. 597, 608 (S.D.N.Y. 1978); *Person v. New York Post Corp.*, 427 F. Supp. 1297, 1303-04 (E.D.N.Y.), *aff'd without op.*, 573 F.2d 1294 (2d Cir. 1977).

Accordingly, only the Board, the party to the Commitment Agreement with KKR, has standing to bring this suit. Neither Petitioner Kahn nor Thorne is alleged to be a party to the 1987 Commitment Agreement or any other agreement with any Respondent, nor is either Kahn or Thorne alleged to be a client or a prospective client of any of the Respondents, as required for standing under the IAA.

Additionally, both the Minnesota Constitution and Statutes vest exclusive power to act on behalf of the Board in

---

[21] In its Answer, the Board also set forth Petitioners' lack of standing as an affirmative defense. (JA-387, ¶ 34)

the Minnesota Attorney General. The Minnesota Legislature expressly conferred any right of action on behalf of the Board, which consists of individually elected officers of the executive branch, exclusively in the Minnesota Attorney General.[22] Minn. Stat. § 8.06 (1990); Minn. Const. art. XI, § 8; Minn. Stat. § 11A.03 (1990). Article III of the Minnesota Constitution prohibits one department of government from exercising powers of another. Minn. Const. art. III, § 1. Thus, only the Attorney General has authority to act on behalf of the Board.[23] Consequently, neither Kahn nor Thorne can have standing to bring the Board's IAA claim, whether in Kahn's capacity as a legislator or a taxpayer or in Thorne's alleged capacity as a trust beneficiary.

In addition to the judicial inefficiencies which would result from the exercise of certiorari jurisdiction in a proceeding commenced by strangers to the matter purportedly in dispute, there are also compelling policy reasons for not expanding standing under the IAA to legislators, citizens, taxpayers and the like. To permit such second-guessing of the investment decisions of the Board (and therefore to permit second-guessing of all similarly situated state boards) is to destroy the ability of investment boards to make meaningful and final investment decisions, and would thus bring massive uncertainty to public pension trustees and to those with whom they invest. Since Petitioners lack standing to bring this action, this Court should therefore decline to grant certiorari.

---

[22] Contrary to the implication of Petitioners' footnote 3 (Ptn. 8 n.3), Minnesota has never recognized the right of anyone to bring a derivative claim on behalf of the Board.

[23] Clearly then, under Minnesota law, Petitioners fall outside the "zone of interests" required for standing. *See Data Processing*, 397 U.S. at 153, 90 S. Ct. at 830.

CONCLUSION

The issue upon which this case was decided, the statute of limitations applicable to an IAA claim, is one of first impression in the Circuit Courts of Appeals. No conflicting rulings exist there or among the District Courts, all of which that have decided the issue have been in accord with the Second Circuit. Similarly, no state court decisions are in conflict with the Second Circuit's decision.

No reason is advanced why this Court should interfere in the plainly correct decision of the court below. For that reason and for reasons of judicial efficiency and public policy, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FREDRIC J. ZEPP
Counsel of Record
LOUISE M. ZEITZEW
NANCY E. MCDERMOTT

LATHAM & WATKINS
885 Third Avenue
Suite 1000
New York, New York 10022
(212) 906-1200
Counsel for Respondents

Dated: New York, New York
October 26, 1992